4

No. 89-1667

In the Supreme Court of the United States

OCTOBER TERM, 1990

JAY PALMER, ET AL., PETITIONERS

v.

BRG OF GEORGIA, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

KENNETH W. STARR
Solicitor General

JAMES F. RILL
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

MICHAEL BOUDIN
Deputy Assistant Attorney General

JAMES A. FELDMAN
Assistant to the Solicitor General

CATHERINE G. O'SULLIVAN
DAVID SEIDMAN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

JAMES M. SPEARS
General Counsel
Federal Trade Commission
Washington, D.C. 20580

QUESTIONS PRESENTED

1. Whether the court of appeals erroneously restricted the scope of the per se rule of antitrust liability applicable to agreements between horizontal competitors by holding that (a) such an agreement is not per se unlawful price fixing unless the competitors agree on a price to be charged; or (b) such an agreement is not per se unlawful market allocation if the competitors merely allocate markets between them rather than dividing some single market in which both did business.

2. Whether disputed issues of fact were improperly resolved on summary judgment in this case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1667

JAY PALMER, ET AL., PETITIONERS

v.

BRG OF GEORGIA, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Respondent Harcourt Brace Jovanovich Legal and Professional Publications (HBJ) is the nation's largest provider of bar review materials and lecture services, selling comprehensive bar review courses directly or through licensees in 40 states under the trade name BAR/BRI. 874 F.2d 1417, 1429;[1] Pet. App. 175. It began selling bar review courses in Georgia in 1973. 874 F.2d at 1418. Respondent BRG of Georgia, Inc., and its predecessor, Bar Review Group, Inc., have offered a comprehensive review course to Georgia bar applicants

---

[1] Because of typographical errors in the petitioners' Appendix, we cite to the reported opinion of the court of appeals.

since 1976. *Id.* at 1428; Pet. App. 136 & n.50. By 1979, HBJ and BRG were the dominant providers of bar review courses to University of Georgia students. 874 F.2d at 1419; *id.* at 1429, 1440. In addition, both HBJ and BRG marketed their courses statewide and offered them at various locations, including Athens, Atlanta, and Macon. 874 F.2d at 1429 n.4; Pet. App. 142.

Competition, including price competition, between the two firms was vigorous. BRG in 1979 was receiving free written materials from the West Publishing Company relevant to the multistate portion of the bar examination; this allowed BRG to charge relatively low prices for its course. 874 F.2d at 1418. HBJ lowered its prices in response to BRG's prices, with the result that, according to Richard Conviser, chairman of HBJ's board of directors, HBJ "lost $45,000 on revenues of $120,000 without accounting for overhead." *Id.* at 1418. Also according to Conviser, HBJ in 1979 decided to withdraw from the Georgia market. *Ibid.* Nothing in the record other than Conviser's statements in subsequent litigation evidences this decision, however, and apparently HBJ continued selling a course to be offered in mid-1980. *Id.* at 1429; Pet. App. 139.

In early 1980, Conviser and respondent Pelletier, owner of BRG, had a series of meetings.[2] At their first meeting, they discussed the possibility of HBJ's purchasing BRG or BRG's purchasing HBJ's Georgia assets; the second meeting added the possibility of a licensing arrangement; the third focused on licensing. 874 F.2d at 1429 & n.5.

[2] The rivalry between BRG and HBJ was "rancorous and vitriolic," in Judge Clark's terms. 874 F.2d at 1429. In prior litigation, Conviser testified that he and Pelletier met to discuss "this problem," which he explained meant "whatever was going on down here in this market was just the ugliest thing I have ever seen with these accusations and counter accusations, and we have got to do something about this and sort of reach an accord." Plaintiffs' Statement of Material Facts To Which Plaintiffs Contend There Is No Genuine Issue To Be Tried, Attachment 1, at 38.

These meetings resulted in a written agreement (the 1980 agreement) that ended competition between HBJ and BRG. The 1980 agreement gave BRG an exclusive license to market HBJ's multistate bar review materials in Georgia as part of BRG's course and to use HBJ's BAR/BRI trade name in Georgia. 874 F.2d at 1418. In return, HBJ would receive $100 per student enrolled, plus 40% of the amount charged over $350. *Id.* at 1429. Moreover, "HBJ agreed that it would no longer offer a bar review course in Georgia and that it would not compete with BRG in Georgia. BRG agreed not to compete with HBJ outside Georgia." *Id.* at 1418. Immediately following this agreement, HBJ withdrew from the Georgia market and "the price of BRG's course skyrocketed [from] $150 to over $400." Pet. App. 140.

In 1982, a group of Georgia law students brought an antitrust class action against BRG and HBJ; the suit was settled, with partial refunds paid to the class members. 874 F.2d at 1419. While the suit was pending, BRG and HBJ executed a new agreement (the 1982 agreement), which according to its terms superseded the 1980 agreement. The new agreement made BRG's license to use HBJ's multistate materials non-exclusive, and it did not include covenants not to compete. However, like the 1980 agreement, it provided that BRG would have an exclusive license to use the name BAR/BRI in Georgia.[3] Since execution of the 1982 agreement, "HBJ has not competed with BRG in Georgia nor licensed its multistate materials for use by any other Georgia bar review course." *Ibid.*

[3] The district court opinion, as reproduced in the appendix to the petition for certiorari, contains a serious typographical error. Referring to the 1982 agreement, the appendix reproduces the following sentence: "It does not reflect that BRG purchases the multi-state materials from Harcourt, pays [H]arcourt a fee, and uses Harcourt's trade name 'BAR/BRI.'" Pet. App. 173. The word "not" does not appear in this sentence in the district court opinion of July 8, 1987. See D. Ct. Op. 4.

2. On November 4, 1985, petitioners—Georgia law students not part of the class in the prior litigation—brought this action, purportedly on behalf of a class of those who had contracted to take BRG's bar review course in Athens, Georgia in preparation for Georgia Bar examinations to be administered after June 14, 1985. The nine-count complaint alleged numerous violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1 and 2. Count I charged that beginning "at a time believed to be as early as March, 1980, and continuing to the present day," respondents had conspired in restraint of trade, *inter alia*, "to increase and fix the price charged by BRG for its bar review course, and to allow [HBJ] to share, directly and indirectly, in BRG's increased bar review profits," and in particular "to increase the full tuition rate for BRG's bar review course * * * from approximately one hundred dollars ($100.00) to approximately four hundred and eighty-five dollars ($485.00)" (Compl. paras. 43-44), in violation of Section 1 of the Sherman Act. Count II charged that, in the same time period, respondents had conspired to restrain the sale of bar review courses nationwide, by, *inter alia*, dividing among themselves markets, customers, and territories (*id.* paras. 50-51), in violation of Section 1 of the Sherman Act.[4]

On petitioners' motion for partial summary judgment as to the Section 1 counts and respondents' motion for

---

[4] Counts III and IV alleged that the defendants had engaged in a boycott and concerted refusal to deal and had created an unreasonable joint venture. Petitioners do not here renew their contention, rejected by the court of appeals, that the district court erred in granting summary judgment to respondents with respect to these counts. Counts V through VII charged conspiracy to monopolize, attempt to monopolize, and monopolization in Georgia and Counts VIII and IX charged conspiracy to monopolize and attempt to monopolize nationwide. Of the Section 2 counts, petitioners apparently renew their challenge only to the grant of summary judgment to respondents on Counts VI, conspiracy to monopolize in Georgia. See Pet. i, 43-46.

summary judgment, the district court held that the per se rule of Section 1 antitrust liability did not apply. It found that "the arrangement between BRG and [HBJ] does not fit within any recognized category of per se liability." Pet. App. 148. As to Count I, the court explained that "the agreement is not a classic form of price fixing where two competitors agree what price they will charge for their products. On the contrary, neither agreement explicitly addresses the factor of price, and [HBJ] has never had any right under either the 1980 or 1982 agreement to be consulted about the price of the BRG course." *Ibid.* As to Count II, the court explained:

> Neither agreement between BRG and [HBJ] constitutes the sort of market or customer allocation agreement which has been recognized as a basis for per se liability. *Cf.* [*United States* v. *Topco Assocs., Inc.*, 405 U.S. 596 (1972)]. This is not a situation where competitors divided up a market in which both have previously done business, each taking a portion of that market. BRG has never done business outside the state of Georgia, and nothing in the record suggests that it ever intended to do so. [HBJ] as noted has done business virtually nationwide, but withdrew from the Georgia market following the 1980 agreement between BRG and [HBJ]. Thus, the only market ever claimed by both Defendants is the state of Georgia, and clearly the state of Georgia was not divided up under either the 1980 or 1982 agreements.

Id. at 149-150.

The court permitted petitioners to present further evidence to establish a violation of Section 1 under the rule of reason. After reviewing the submissions, the court found that there was still insufficient evidence of a "present anticompetitive effect in a relevant geographic and product market" to establish a rule of reason violation. Pet. App. 177.[5]

---

[5] The court also granted summary judgment to respondents with respect to Counts III and IV.

With respect to petitioners' Sherman Act Section 2 claims, the court granted summary judgment to respondents on the ground that what it believed to be petitioners' sole evidence of product and geographic market was "without evidentiary value." Pet. App. 157-158. The district court also found that, with respect to claims of monopolization and attempted monopolization in Georgia, petitioners' only effort to present evidence of monopoly power was "clearly insufficient." Pet. App. 159.

3. A divided panel of the court of appeals affirmed. With respect to the claim of a per se Section 1 violation, the majority noted respondents' contention that "they were in a vertical supplier-retailer relationship at the time of the first license agreement; had executed a second agreement; and have submitted affidavits that they were free to compete with each other." 874 F.2d at 1423. The majority summarized the district court's opinion and concluded that "[t]he district court's analyses of these issues are thorough and legally sound." *Id.* at 1424.

Judge Clark, dissenting, pointed out that BRG and HBJ were horizontal competitors at the time they entered the 1980 agreement and that they remained "at least *potential competitors*." 874 F.2d at 1433. He concluded that the district court had erred in holding that to prove a per se violation under a geographic market allocation theory, petitioners had to show "that BRG and HBJ have sub-divided some relevant market in which they previously competed" (*ibid.*), since there was no legal distinction between market "division" and market "allocation." He also concluded that the district court had erred in holding that per se unlawful horizontal price fixing required an explicit agreement on prices to be charged or that one party have the right to be consulted about the other's prices. *Id.* at 1434. Finally, Judge Clark dissented from the majority's holdings that respondents were entitled to summary judgment on petitioner's rule of reason and monopolization claims. *Id.* at 1436-1441.

4. The court denied both rehearing and rehearing en banc.[6] Pet. App. 130-133. The panel, however, modified its opinion by adding the following (*id.* at 132-133):

> We agree with the district court that the modified agreement (1982) is not a market allocation agreement to which per se liability applies. First, the agreement is not a "naked agreement" between competitors to allocate the market. Second, HBJ and BRG are not horizontal competitors. HBJ's affidavit states that it is no longer a competitor in the Georgia market. The appellants have failed to produce evidence to the contrary. In the absence of evidence other than the affidavit on this issue, we cannot conclude that HBJ is doing business in Georgia.

Judge Clark adhered to his dissent.

DISCUSSION

The court of appeals' opinion leaves us uncertain of its reasons for affirming the district court's grant of summary judgment to respondents on petitioners' claims under the per se rule of antitrust liability. We discern several possible reasons in the opinion. However, all of these reasons are in sharp and unexplained conflict with clearly established law. Because those conflicts are so clear and raise no unsettled question of law, this case does not merit plenary review. Nevertheless, since on the most plausible reading the opinion below substantially restricts the scope of the per se rule and therefore poses a threat to proper enforcement of the antitrust laws, we suggest that the Court grant certiorari and summarily reverse.

---

[6] The United States filed a brief in support of the suggestion of rehearing en banc. It contended that the court had erred in holding that the per se rule was not applicable where a naked agreement not to compete between horizontal competitors merely allocated, rather than divided, territory. The United States, however, took no position on the merits of plaintiffs' case.

1. If taken to apply to agreements between horizontal competitors, the district court's statements limiting per se liability under the Sherman Act for price-fixing or market allocation, repeated and endorsed by the court of appeals, are plain legal error. In particular, the conclusions of the courts below that a per se price-fixing violation requires an agreement that "explicitly addresses the factor of price" (Pet. App. 148) and that a market allocation agreement is not per se illegal if the parties do not divide up and continue to do business in any single market conflict with numerous decisions of this Court.

a. Petitioners allege an agreement between horizontal competitors not to compete, and we do not believe the appropriate resolution of this case turns on whether that agreement is properly characterized as price fixing or market allocation.[7] Nonetheless, the courts below purported to resolve the price-fixing claim, independently of the market allocation claim, on the incorrect ground that neither written agreement between the parties included a provision setting a specific price to be charged.

This Court long ago established that "[u]nder the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se." *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940). See also, *e.g.*, *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643 (1980) (horizontal agreement to terminate the practice of giving credit falls within the traditional per se rule against price fixing); *National Society of Prof. Engineers* v. *United States*, 435 U.S. 679 (1978) (horizontal agreement that interferes with setting of price by free market forces is illegal on its face). This is not to say that all agreements between horizontal competitors that have an effect on price are per se unlawful as price fixing. See, *e.g.*, *Broadcast Music, Inc.* v. *Columbia Broadcasting Sys.*, 441 U.S. 1 (1979) (although horizontal competitors may have literally fixed a price, licensing arrangement is not per se unlawful where practice does not appear facially to be one that would always or almost always tend to restrict competition and decrease output and arrangement appears necessary to market the product at all). But to hold that an agreement between horizontal competitors to raise prices is not per se unlawful price fixing merely because there is no agreement on a specific price is simply wrong.[8]

[7] The district court observed that petitioners' various theories of Sherman Act Section 1 liability were "improperly pled as separate counts. [Petitioners] have one cause of action for an alleged violation of § 1." Pet. App. 143 n.55.

b. More centrally, the courts below dramatically curtailed the scope of the per se rule against market allocation. Contrary to the district court's holding endorsed by the court of appeals, the per se rule applies equally to agreements allocating markets between horizontal competitors and to agreements dividing a market between horizontal competitors. See *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 768 (1984) ("market allocation" is per se offense); *Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332, 344 n.15 (1982) ("division of markets" is per se offense). In either case, the parties divide up territory, each agreeing not to compete in the territory assigned to the other. The agreement has an anticompetitive impact regardless of whether the parties split a market within which both do business, or whether they merely give one market to one and another market to the other (*i.e.*, agree to eliminate actual or potential competition).

[8] We do not suggest that any agreement between BRG and HBJ is, or is not, per se unlawful price fixing. Although petitioners clearly alleged an agreement specifically addressing price, it is less clear that they presented evidence of such an agreement. In our view, because petitioners' price-fixing theory appears not to be clearly distinct from their market allocation theory, resolution of this case should turn upon whether the courts below properly held that petitioners adduced sufficient evidence of a per se unlawful market allocation.

This Court has found territorial market division to be a per se offense without reference to whether any particular maket was divided among actual competitors. In *United States* v. *Topco Assocs., Inc.*, 405 U.S. 596 (1972), the government challenged a "division of territories" that was the "product of agreement among actual or potential competitors." U.S. Br. at 18, *United States* v. *Topco, supra* (1971 Term). In fact, the agreement involved retail grocery chains "geographically . . . widely dispersed," which rarely operated in the same trading or marketing areas. Topco Associates Br. at 16, 19. The Court held the per se rule applicable because firms at the same level of the marketing structure had allocated territory among themselves. The Court nowhere suggested that its holding depended on whether particular marketing areas had been split among competitors.[9]

It is, therefore, plaintly wrong to hold that agreements that would be per se unlawful if they divided territory between horizontal competitors are not per se unlawful because they merely allocate territory between horizontal competitors.

2. Respondents do not attempt to defend the opinions below as correctly stating the law with respect to agreements between horizontal competitors. The suggest, rather, that the courts below meant their analyses to apply only to vertical, rather than to horizontal, agreements.[10] We have considered this suggestion as well as the possibility that the courts below could have been referring only to horizontal restraints on price or territory that are ancillary to an agreement with a different purpose and primary effect. We have, however, been unable to find a basis for such alternative readings in the text of the opinions below and conclude that any such reading could not be correct unless the courts below improperly, and sub silentio, resolved disputed factual issues against petitioners in ruling on summary judgment.

a. Respondents contend that the court of appeals, and presumably the district court as well, simply did not "address[] relationships between horizontal competitors." Br. in Opp. 5. Their argument section, relying on the court of appeals' amendment to its opinion, suggests that they could not have been found to have entered any horizontal conspiracy because they were not in fact competitors in 1985. *Ibid.* Their "statement of the case" (*id.* at 2) suggests their argument below, namely, that HBJ had decided to withdraw from Georgia prior to the 1980 agreement, so that not even the 1980 agreement was between horizontal competitors. 874 F.2d at 1423, 1432. This contention, however, is insufficient to explain the language or result of the lower courts' analysis.

The courts below did not find that BRG and HBJ had ceased to be horizontal competitors prior to entering into the 1980 agreement. The district court found that the two firms competed in 1979 and that HBJ was still selling its bar review course in Georgia at the time Conviser and Pelletier "got together." Pet. App. 138-139. The court of appeals merely observed that Conviser had stated

[9] Chief Justice Burger dissented, viewing the restraint at issue as ancillary to a cooperative endeavor with a lawful purpose, 405 U.S. at 613 (Burger, C.J., dissenting), and courts of appeals have read subsequent decisions of this Court as effectively overruling *Topco* to the extent *Topco* can be said to hold ancillary market allocations per se unlawful. See, *e.g.*, *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F.2d 210, 227 (D.C. Cir. 1986), cert. denied, 479 U.S. 1033 (1987). That aspect of *Topco*, however, has no bearing on our point here, which addresses simply the purported distinction between "allocation" and "division."

[10] The per se rule has a much narrower scope with respect to vertical agreements than to horizontal agreements. See, *e.g.*, *Business Elecs. Corp.* v. *Sharp Elecs. Corp.*, 485 U.S. 717, 735-736 (1988) (vertical agreement not per se unlawful price fixing absent agreement on price or price levels); *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977) (vertical territorial restraints not per se unlawful). We do not address whether petitioners' showing was sufficient to avoid summary judgment on a per se theory of vertical price fixing.

in an affidavit that HBJ had decided to withdraw from the Georgia market prior to the 1980 agreement but added, as did the district court, that "no documentation of this decision has been offered." 874 F.2d at 1418; see Pet. App. 139.

Whatever may be the truth of the matter, Conviser's unsupported affidavit is not a sufficient basis for a court to find, on summary judgment, that HBJ was no longer a competitor of BRG by the time of the 1980 agreement. First, there was ample evidence to support a jury finding that HBJ had not withdrawn, or even firmly decided to withdraw, at that time. The district court, after all, found that HBJ was continuing to sell its bar review course in Georgia. In addition, after the alleged decision Conviser and Pelletier discussed HBJ's buying out BRG (see 874 F.2d at 1429 & n.5); this apparently conceded fact supports an inference that HBJ had not decided to withdraw from Georgia.[11] Second, even if HBJ had decided to withdraw from Georgia just prior to the 1980 agreement, it could not be said that HBJ and BRG, as a matter of law, were no longer horizontal competitors—unless the decision to withdraw were irrevocable. Moreover, even if such a decision were proven to be irrevocable, HBJ presumably remained capable of re-entering the Georgia market at any time and it continued to operate at the same marketing level as BRG outside of Georgia. Thus without resolving a disputed issue of fact against petitioners, the courts below could not have found that the 1980 agreement was vertical rather than horizontal.

In amending its opinion, the court of appeals found that HBJ and BRG "*are*" not horizontal competitors be-

[11] The 1980 agreement in fact specifically provides (in paragraphs 4.2, 4.3, and 4.5) that HBJ will offer certain courses in Georgia after the effective date of the agreement. The record indicates neither whether BRG's offerings were in the same relevant product market as these HBJ courses nor whether HBJ ever actually offered these courses in Georgia.

cause it was undisputed that HBJ "*is* no longer a competitor in the Georgia market." Pet. App. 132-133 (emphasis added). Since HBJ withdrew from Georgia following the 1980 agreement, this suggests the court did not view the 1982 agreement as between horizontal competitors. We question whether the 1982 agreement is properly treated as simply one between parties in a vertical relationship where, according to petitioners' theory (supported by sufficient evidence to withstand summary judgment), the parties ceased to be horizontal competitors as a result of a per se unlawful agreement not to compete.

More fundamentally, a finding that the 1982 agreement was not between horizontal competitors cannot in any event suffice to dispose of petitioners' per se case on summary judgment. Petitioners alleged a conspiracy beginning in 1980 and continuing at least until the time of the complaint, thus in effect resting their case on the 1980 agreement.[12] To be sure, respondents may have withdrawn from or abandoned their alleged conspracy in entering into their 1982 agreement. But as Judge Clark observed in dissent, the district court did not address this issue and thus "it is an unsettled factual issue whether the conspiratorial objectives manifest in the 1980 agreement between HBJ and BRG have continued despite the supposedly ameliorative modifications made in 1982." 874 F.2d at 1436 n.25. The panel majority did not address this question at all.[13]

[12] As respondents helpfully observe, the complaint "made no reference at all to the 1982 agreement." Br. in Opp. 3.

[13] In any event, we do not see how the court of appeals could have resolved this factual issue against petitioners as a matter of summary judgment. Although both BRG and HBJ denied they had any continuing understanding apart from the written 1982 agreement (Br. in Opp. 7), a jury would not be required to credit the denial, and there was sufficient evidence for a jury to conclude that there had been no withdrawal from the conspiracy allegedly entered into in 1980. As Judge Clark observed: "In the absence of proof of

b. In our brief in support of the suggestion of rehearing en banc, we observed that for purposes of its per se analysis, the court of appeals had considered the agreement to allocate markets in this case as if it were a naked agreement not to compete, unredeemed by any claim of integrative efficiencies.[14] Judge Clark, in dissent, termed the 1980 agreement a "blatant 'naked' restriction on output," noting that defendants had failed to provide evidence "of some procompetitive efficiency-enhancing virtue to their agreement." 874 F.2d at 1437. In amending its opinion, the court said that the "modified agreement (1982) * * * is not a 'naked agreement' between competitors to allocate the market." Pet. App. 132.

---

withdrawal, the conspirators are presumed to continue in their conspiracy particularly where they continue to share the fruits of their conspiracy, in this case through the revenue-sharing provision in the 1980 and 1982 agreements." 874 F.2d at 1436 n.25. Moreover, the 1982 agreement itself makes it unlikely that HBJ would enter the Georgia market in competition with BRG, because any resulting price competition would reduce HBJ's revenues from its agreement with BRG and because HBJ could not use its well-known trademark in Georgia. *Id.* at 1435. Thus a jury could reasonably conclude that the 1982 agreement, far from evidencing withdrawal, reflects an intent to preserve the benefits of the conspiracy entered into in 1980.

[14] By a "naked" agreement, we mean an agreement that is not ancillary to any efficiency-producing integration of functions or assets by competitors. See *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), aff'd, 175 U.S. 211 (1899); *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986), cert. denied, 479 U.S. 1033 (1987). At the time BRG and HBJ agreed not to compete, they also entered into a licensing arrangement with respect to Georgia alone, thus establishing a new vertical relationship. If the agreement not to compete were ancillary to the licensing agreement, different issues would be presented. On this record, however, respondents did not establish on the basis of undisputed facts that the agreement not to compete was merely ancillary in this sense. Indeed, the facts might be interpreted to suggest that it was, instead, the licensing arrangement that was merely ancillary to the agreement not to compete.

If the court's amendment was meant to cure the flaws in the original per se analysis, it failed of that purpose. First, the amendment, which speaks only of the 1982 agreement, plainly does not say that the 1980 agreement was anything but a "naked agreement" not to compete, and, as we have explained, this case cannot properly be resolved on summary judgment as if the 1980 agreement had never existed. Second, the amendment fails to identify—and we are unable to find—evidence sufficient to conclude on summary judgment that even under the 1982 agreement, the licensing arrangement, rather than the elimination of competition, was the essence of the transaction. As Judge Clark concluded, there was no evidence of any efficiency enhancing purpose or effect. See 874 F.2d at 1437.

3. Although the court of appeals' treatment of the per se claims in this case is erroneous and apparently in conflict with this Court's long-standing precedents concerning the per se rule, we nevertheless do not urge plenary review. If, as we believe, the court of appeals did radically misinterpret and misstate governing precedent concerning the application of the per se rule to horizontal conspiracies, its errors are so clear as to require no further briefing or argument in this Court. Indeed, respondents make no attempt to defend the courts below with respect to anything they may have said about horizontal conspiracies and the per se rule. If, on the other hand, the court of appeals did not misapprehend established precedent concerning the per se rule, then it plainly misapprehended the standards for summary judgment—an error similarly too manifest to warrant plenary review. Moreover, we see no useful purpose to be served by further review of this case merely to resolve ambiguity concerning which path the courts below took in going astray.

Nevertheless, we believe the errors below concerning the scope of the per se rule should not stand uncorrected. Because the court of appeals' opinion can, and

likely will, be read to restrict very substantially the scope of the per se rule, it poses a threat to the proper enforcement, both private and public, of the antitrust laws.[15] Accordingly, we suggest that the Court grant the petition and summarily reverse and remand for further proceedings. We believe it would suffice for the Court to reiterate that a horizontal price-fixing agreement can be found even absent agreement on a specific price to be set, that market allocation, and not merely market division, by horizontal competitors is per se unlawful, and that courts do not properly resolve disputed questions of material fact on summary judgment.

4. In contrast to the court of appeals' holdings with respect to petitioners' per se claims, the court's holdings concerning petitioners' rule of reason and monopolization claims do not warrant further review. Petitioners claim that the court of appeals incorrectly held that petitioners were required to prove relevant markets through structural evidence and failed to do so. Petitioners assert that the affirmance of summary judgment for respondents on the rule of reason theory and conspiracy to monopolize claim rested on that holding.

a. The courts below indeed appear to have rested their dismissal of petitioners' conspiracy to monopolize claim at least in part on petitioners' failure to prove market structure. The district court noted a number of deficiencies in petitioners' proof, including the failure to consider whether written bar review materials and courses offered in locations outside Athens, Georgia, are within the relevant market. Pet. App. 156-157. Petitioners' disagreement with those conclusions raises at most the question whether the district court accurately assessed petitioners' proof of market definition; that question does not warrant further review.

Although petitioners contend that this case raises broader questions concerning the need to introduce evidence of market structure in a Section 2 conspiracy to monopolize case (see Pet. 43-45), we do not believe that this is an appropriate vehicle for addressing such questions. Petitioners' conspiracy to monopolize claim is essentially a restatement of their primary claim that respondents, horizontal competitors in 1980, conspired to restrain trade through an explicit market allocation and never withdrew from that conspiracy. That claim is more properly and directly considered under Section 1 where, if petitioners are correct, the agreement to allocate would be a per se violation and proof of market power would be unnecessary.

[15] See Ross, *1989 Eleventh Circuit Survey: Antitrust*, 41 Mercer L. Rev. 1217, 1225-1229 (1990).

b. With respect to the court of appeals' rejection of petitioners' rule of reason theory, it is difficult to discern the precise course of reasoning adopted by the court of appeals. See 874 F.2d at 1424-1428. As we have pointed out, insofar as the 1980 agreement was a "naked" agreement to allocate markets among competitors, it is per se unlawful and no further analysis under the rule of reason is necessary. The rule of reason becomes relevant only in analyzing respondents' contentions that the 1980 agreement was in essence a vertical licensing agreement, and that any horizontal features were merely ancillary.

Contrary to petitioners' contention, we do not find any explicit or implicit holding in the court of appeals' opinion (see 874 F.2d at 1424-1426) that petitioners were required to prove market structure in order to prevail on a rule of reason theory. Instead, we read both opinions below to rest at least in part on the courts' conclusions that petitioners failed to present sufficient evidence of anticompetitive effect—*i.e.*, that prices increased and/or output decreased as a result of the challenged conduct.[16] See *id.* at 1425-1426; Pet. App. 159-160, 172-175. In particular, the courts found petitioners' evidence of large

[16] Indeed, had the court of appeals required proof of market structure, as petitioners contend, its holding that such proof was deficient would have made discussion of petitioners' proof of anticompetitive effect unnecessary.

price increases inconclusive, since such increases could have been explained by increases in costs incurred in providing bar review courses. See 874 F.2d at 1425; Pet. App. 173-174. Having failed to find direct proof of anticompetitive effect, the courts below relied on petitioners' failure to introduce credible evidence of market structure to find that they had not made out a Section 1 violation on a rule of reason theory. Cf. *FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. 447, 460-461 (1986).

Because the court of appeals' result thus hinged on petitioners' perceived failure to present sufficient evidence of anticompetitive effect, petitioners' second question—"[w]hether a Sherman Act plaintiff in a Section One 'Rule of Reason' * * * case necessarily must submit structural evidence to prove specifically-defined markets" (Pet. i)—is not raised by the court of appeals' treatment of their rule of reason theory. Therefore, further review with respect to that question is not warranted.

5. Finally, petitioners contend that the court of appeals incorrectly described the contents of the summary judgment record and misapplied the applicable summary judgment standard. We agree that the court below appears to have erred; petitioners' allegations of explicit agreement and subsequent price increases constituted a sufficient showing to create a genuine issue of material fact with respect to the issue of anticompetitive effect.[17] Nonetheless, the court's error may well have been limited

[17] Although a price increase of the magnitude alleged by petitioners *could* of course have been caused by increases in the cost of providing bar review courses, the only evidence of increased cost noted by the courts below was that West Publishing Company discontinued no-cost distribution of its written multistate materials. See 874 F.2d at 1425; Pet. App. 173-174. No evidence was noted concerning the price West intended to charge for those materials, nor did respondent introduce evidence concerning other costs of providing a bar review course before and after the 1980 agreement. In these circumstances, respondents are not entitled to summary judgment based on mere speculation about the causes of the cost increases.

to assessment of the facts offered in this particular case. Petitioners advance no credible basis for their contention (Pet. 46-55) that the error is symptomatic of wider problems affecting this or other courts of appeals. Plenary review to correct any error in assessing the facts in this particular case is therefore not warranted.

CONCLUSION

The petition for writ of certiorari should be granted with respect to the first question presented and the Court should summarily reverse and remand.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JAMES F. RILL
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

MICHAEL BOUDIN
Deputy Assistant Attorney General

JAMES A. FELDMAN
Assistant to the Solicitor General

CATHERINE G. O'SULLIVAN
DAVID SEIDMAN
Attorneys

JAMES M. SPEARS
General Counsel
Federal Trade Commission

SEPTEMBER 1990

☆ U. S. GOVERNMENT PRINTING OFFICE: 1990 262203 20117